MILLER & VAN EATON
P. L. L. C.

MATTHEW C. AMES
KENNETH A. BRUNETTI*
FREDERICK E. ELLROD III
MARCI L. FRISCHKORN
GAIL A. KARISH*
WILLIAM L. LOWERY
NICHOLAS P. MILLER
MATTHEW K. SCHETTENHELM
JOSEPH VAN EATON
*Admitted to Practice in California Only

1155 CONNECTICUT AVENUE, N.W.
SUITE 1000
WASHINGTON, D.C. 20036-4320
TELEPHONE (202) 785-0600
FAX (202) 785-1234

MILLER & VAN EATON, L.L.P.
580 CALIFORNIA STREET
SUITE 1600
SAN FRANCISCO, CALIFORNIA 94104
TELEPHONE (415) 477-3650
FAX (415) 477-3652

WWW.MILLERVANEATON.COM

OF COUNSEL:
JAMES R. HOBSON
GERARD L. LEDERER
WILLIAM R. MALONE
NANNETTE M. WINTER†
†Admitted to Practice in New Mexico Only

September 5, 2007

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Notice of *ex parte* meeting in MB Docket No. 07-51, Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments.

Dear Ms. Dortch:

On September 5, 2007, representatives of the Real Access Alliance ("RAA") met with members of the Media Bureau and the Office of General Counsel in connection with the matter identified above. The RAA representatives were:

Jim Arbury, Senior Vice President, National Multi Housing Council ("NMHC")
Betsy Feigin Befus, Vice President and Special Counsel, NMHC
Steve Sadler, Director of Ancillary Services, Post Properties
Megan Booth, Institute of Real Estate Management
Jason Todd, Building Owners and Managers Association
Matthew C. Ames, Miller & Van Eaton, PLLC

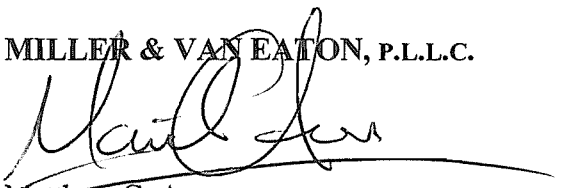
The Commission staff representatives were: Monica Desai, Rosemary Harold, Mary Beth Murphy, John Norton, John Berresford, Holly Saurer, Matthew Berry and Ajit Pai.

During the meeting, the participants discussed the reasons that the RAA believes that exclusive agreements between property owners and video service providers for access to residential owners should not be regulated by the Commission.

A copy of the materials distributed at the meeting is attached.

Very truly yours,

MILLER & VAN EATON, P.L.L.C.

By 

Matthew C. Ames

Attachment
6309\05\00131571.DOC

THE REAL ACCESS ALLIANCE OPPOSES FCC REGULATION OF EXCLUSIVE CONTRACTS FOR THE PROVISION OF CABLE SERVICE IN APARTMENT BUILDINGS AS BOTH UNNECESSARY AND UNLAWFUL.

1. **Exclusive Contracts Are a Central Part of a Functioning Market Mechanism.** Exclusive contracts are an effective free market mechanism for allocating scarce capital for network construction and service upgrades. There is no evidence in the record of a market failure that would justify regulation. Commission regulation would hinder the ability of property owners to exchange exclusivity for other valuable benefits that benefit subscribers – such as upgraded facilities in properties that an incumbent cable provider might otherwise not choose to upgrade because of the building's size, resident demographics, or other characteristics.

2. **The Commission Cannot Assume that Competition Inside Buildings Will Meet the Same Need.**

    - It will be many years, if ever, before all residential buildings are served by multiple facilities-based providers offering the "triple play." In that environment, exclusive contracts still have a role to play, because they create an incentive for improvements in otherwise "marginal" properties, where investment by a competitor may or may not happen. Restricting the use of exclusives increases property owners' risks and reduces their options.

    - Restricting exclusives also forces property owners who are prepared to make their own investments in advanced wiring to subsidize the communications industry, and will reduce their willingness to make such investments.

3. **Verizon and the other ILECs Do Not Need the Commission's Assistance.**

    - The ILECs already have access to nearly every residential building in the country for telephone service, and owners always face extreme market pressure to grant them access in new construction. The ILECs have great leverage in discussions regarding Internet and cable service as well, an advantage those companies are more than willing to exercise. If the Commission's goal is to improve access to the "triple-play," the Commission must consider market power in relation to all three services, not just cable. Citing market power in relation to cable as a factor, but ignoring the power of the ILECs in the phone market, is arbitrary on its face.

    - Property owners fear that preventing cable operators from entering into exclusives will give the telephone companies – particularly the Bell companies – too much power and create an imbalance in the marketplace. The experience of property

owners who deal with ILECs in the marketplace every day suggests that the ILECs – particularly Verizon – are already fully capable of competing with the cable industry.

4. **The Record Shows that Exclusivity Is Not Really a Problem.** Verizon has gained access to over 700,000 units in less than two years; property owners report that the company could have obtained access to more units faster were it more flexible in its approach. In a meeting with the National Multi Housing Council, Verizon itself has acknowledged that in fact it has been denied access to very few buildings: "dozens" out of roughly 500,000 apartment buildings nationwide. Agreements expire every day, and nearly 400,000 new units are added every year: the market offers competitors ample opportunities.

5. **The Commission Has No Authority Over Bilateral Agreements Between Building Owners and Cable Providers for the Use of Space Inside Buildings.**

   - Purporting to regulate the practices of cable operators does not merely result in an incidental effect on building owners: the entire purpose and effect of this proceeding is to regulate certain terms of two-party agreements.

   - The Commission has ruled that Section 628 does not even apply to terrestrial delivery of satellite programming: How can the agency now rule that the statute applies to a type of agreement never contemplated by Congress, or to cable operator behavior unrelated to access to satellite programming?

6. **Banning Exclusive Agreements Will Not Lower Subscriber Rates.**

7. **Property Owners Must Oppose Commission Action Because the Next Logical Step Is Attempting To Create a Right of Entry.** How will the ban be enforced? What if an owner refuses to grant Verizon access because of some other term, such as the length of the agreement, or inability to agree on customer service standards in a building, or . Will Verizon go to the Commission and claim this is a *de facto* exclusive? Will the Commission acknowledge that it would have no power in such a dispute?

8. **Banning enforcement of existing agreements violates the Fifth Amendment.**

   - A retroactive ban would create a *per se* taking when exclusivity takes the form of an easement, as is common, especially in older agreements. Forcing the cable operator to share its exclusive easement is a *per se* physical taking under *Loretto v. Teleprompter Manhattan CTV Corp.*, 458 U.S. 419 (1982), because an easement is a property right. For the same reason, seeking to enforce such a ban against a property owner by allowing a competitor to install wiring parallel to the cable operator's would also be a *per se* taking.

- A retroactive ban would interfere with settled "investment-backed expectations" and thus violate the Fifth Amendment. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

9. Two different but illuminating examples of the complexity of this issue:

- In Loudoun County, Virginia, OVS operator OpenBand was granted exclusive easements for video service by a developer. Verizon was granted rights for voice service using separate easements. In litigation brought by Adelphia seeking access to the easements, the court upheld the easements, thus denying Adelphia access to potential customers in the community. To reverse this result in comparable cases, the Commission must have the power to effect a taking of the property in the easement; this is not just a matter of invalidating a contract term.

- In Alexandria, Virginia, developer of Cameron Station (large townhouse community) granted similar exclusive easements that kept out not only Comcast but Verizon. In this case, resident demand for access to Verizon's voice telephone service was so great that the developer eventually modified the easements to grant Verizon access.

6309\05\00131557.DOC